IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No.....

MINOLA TAMESA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Preliminary Statement.

For a statement showing the opinions of the Courts below, the basis on which the jurisdiction of this Court is claimed, the questions presented, and a statement of the case, reference is here made to the foregoing Petition for Writ of Certiorari.

Specifications of Errors.

The judgment of the District Court, as affirmed by the Circuit Court of Appeals, is contrary to law in that:

(1) The Selective Service agencies had no jurisdiction to make a valid order against the petitioner to submit to a physical examination, as preliminary to induction into the armed forces of the United States.

(2) The District Court was not foreclosed from determining whether the petitioner was subject to the jurisdiction of the Selective Service agencies by *Falbo v. United States.*

ARGUMENT.

I.

The Selective Service Agencies Had No Jurisdiction to Make a Valid Order Against the Petitioner to Submit to a Physical Examination, as Preliminary to Induction Into the Armed Forces of the United States.

Although an American citizen by birth, and of admitted loyalty to the United States, the petitioner, because of claimed war emergency, has in effect been treated as if he were an alien enemy, interned as a prisoner of war, solely because we are now at war with the government where his ancestors were born.

Although an American citizen in name, he was evacuated from his home and livelihood in California, and imprisoned in a Relocation Center, on precisely the same conditions as aliens of Japanese descent. The latter, however, have not been subjected to enforced induction.

Indeed, the treatment meted out to the petitioner, although he is both a citizen and loyal, is not dissimilar from the treatment accorded by our government to aliens of non-Japanese descent—*e. g.*, persons of German or Italian descent, who have been interned because of their disloyalty or danger to the United States.

Guarded by soldiers in a Relocation Center [R. 28], whose involuntary residents are exclusively Japanese, enclosed within a barbed-wire fence [R. 25], the petitioner was, at the time of the order upon him to report for a physical examination, in effect, a war prisoner.

Did Congress, in the enactment of the Selective Training and Service Act of 1940, intend that such a person be

subject additionally to involuntary impressment into military service? We believe Congress had the contrary intent when it adopted the following declaration of policy:

> "The Congress further declares, that in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective compulsory military training and service."
>
> 50 U. S. C., Sec. 301.

The District Court for the Northern District of California in the *Kuwabara* case, *supra*, 56 F. Supp. 716, properly construed the Congressional intent when it stated:[1]

> "Certainly 'fair and just' compulsory military training in a 'free society' is wholly inconsistent with the instant proceeding. The 'due process' guaranteed by the Fifth Amendment means that 'there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights.' *Hagar v. Reclamation District*, 111 U. S. 701, 4 S. Ct. 663, 667, 28 L. ed. 569. 'If any of

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[1]Certainly it may not be claimed that Congress intended that Japanese transported to one Relocation Center (Tule Lake) should not be subjected to induction, while Japanese imprisoned in other Relocation Centers (as for example, Heart Mountain), should be subject to induction.

As already indicated, that would be the state of the applicable law resulting from the opinions, taken together, of the Northern District of California and the Tenth Circuit Court of Appeals in the *Kuwabara* case and in the instant cases respectively. Only the granting of certiorari and the authoritative adjudication by this Court of the issue, will bring judicial order out of the current legal chaos on the subject.

these (general rules) are disregarded in the proceedings by which a person is condemned to the loss of life, liberty, or property, then the deprivation has not been by "due process of law." ' *Hurtado v. California,* 110 U. S. 516, 4 S. Ct. 111, 121, 292, 28 L. ed. 232. 'The public interest that a result be reached which promotes a well-ordered society is foremost in every criminal proceeding. That interest is entrusted to our consideration and protection as well as that of the enforcing officers.' *Young v. United States,* 315 U. S. 257, 258, 260, 62 S. Ct. 510, 511, 86 L. ed. 832.

"The government urges that the question of 'due process' is not reachable at this time, but only by writ of habeas corpus after compliance with the order of the local board. However, it is clear to me that defendant is under the circumstances not a free agent, nor is any plea that he may make, free or voluntary, and hence he is not accorded 'due process' in this proceeding.

"The issue raised by this motion is without precedent. It must be resolved in the light of the traditional and historic Anglo-American approach to the time-honored doctrine of 'due process.' It must not give way to overzealousness in an attempt to reach, via the criminal process, those whom we may regard as undesirable citizens."

56 F. Supp. 716, 719.

We submit that Congress did not intend, in the enactment of the Selective Training and Service Act, that persons treated as was the petitioner, be nonetheless subject to military service; that denuded of essential rights of

citizenship, such persons should still be subject to enforced military service—a duty traditionally and heretofore deemed to be an obligation of citizenship.[2]

This Court should rule accordingly, that under a proper construction of the legislative intent of Congress in the adoption of the Selective Training and Service Act, the petitioner was not subject to induction in the armed forces; and further that the Selective Service agencies had no jurisdiction to make a valid order requiring him to submit to a physical examination as a prelude to induction.

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[2]Our traditional policy of exempting aliens from enforced military service is seen from the following:

President James Madison, writing to the Minister to England James Monroe, in 1804 (Amer. State Papers, For. Rel. III, 81, 87), stated:

> "Citizens or subjects of one country residing in another though bound by their temporary allegiance to many common duties, can never be rightfully enforced into military service, particularly external service, nor be restrained from leaving their residence when they please. The law of nations protects them against both, and the violation of this law by the avowed impressment of American citizens residing in Great Britain may be pressed with greater force on the British Government."

Secretary of State Seward in an official letter to Governor Morton, of Indiana, dated September 5, 1862 (58 MS. Dom. Let. 169) declared:

> "There is no principle more distinctly and clearly settled in the law of nations than the rule that resident aliens not naturalized are not liable to perform military service. We have uniformly insisted upon it in our intercourse with foreign nations."

In 1874 Secretary of State Fish wrote to the Minister to Central America a letter as follows: (Mr. Fish, Sec. of State to Mr. Williamson, Minister to Central America No. 98, July 28, 1874, MS. Inst. Costa Rica, XVII, 191):

> "We did not claim the right to impress aliens into our forces during the late civil war, but it is understood that in one instance at least, in the case of a seige, we sought to justify such an impressment."

The above was cited in "Are Latin American Students Subject to the Draft," in 10 George Washington Law Review 845, May, 1942.

II.

The District Court Was Not Foreclosed From Determining Whether the Petitioner Was Subject to the Jurisdiction of the Selective Service System Agencies by Falbo v. United States.[3]

Falbo v. United States is limited, upon the facts in that case, to a factual situation where a local draft board has jurisdiction over the person of a defendant thereafter charged with a violation of the Selective Training and Service Act, but is claimed to have made an improper classification. The *Falbo* case does not concern itself with a factual situation reflected in the instant case, where a local draft board has no jurisdiction, or acts in excess of its jurisdiction.

In the latter case the claim that an order of an administrative agency is invalid, because that agency lacked jurisdiction, is, and should be, available to a defendant charged with a crime because of the violation of an order of the administrative agency.

Cf.

Union Bridge Co. v. United States, 204 U. S. 364; *Monongahela Bridge Co. v. United States*, 216 U. S. 177.

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[3]For a fuller discussion of this point, see *supra*, p. 9, in Petition for Writ of Certiorari under "Reasons Relied On For Allowance of the Writ," point (3): "The Courts below have not given a proper effect to an applicable decision of this Court, namely, *Falbo v. United States, supra;* and have, in effect, decided an important federal question in conflict with the true import of a decision of this Court, namely the *Falbo* decision."

Conclusion.

The petition for certiorari should be granted; and the judgment rendered by the Circuit Court of Appeals and the District Court against petitioner should be reversed.

Respectfully submitted,

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